appellant resides in a house in Kota Kinabalu with his family. He has no other residence of his own elsewhere. His wife is teaching and his children are schooling in Kota Kinabalu. He has been granted a work pass for three years by the immigration authority. We understand he has now been granted permanent stay. As he wanted to practise law in Sabah he, therefore, waited until the expiration of the statutory period to seek admission to the roll. He affirmed that he intended to reside permanently and continuously in Sabah. His short absence of some ten days was to fetch his family to Sabah. To our minds all these facts indicate positively some semblance of permanence and degree of continuity sufficient to show normal residence. What more can a man do to show that he is a normal resident in Sabah for the period of six months prior to his application for admission?

For reasons given the appeal was allowed.

*Appeal allowed.*

Solicitors: *Skrine & Co.*

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## ENG SIN v. PUBLIC PROSECUTOR

**[F.C. (Gill C.J., Raja Azlan Shah and Wan Suleiman F.J.J.) August 29, 1974]**

**[Kuala Lumpur — Federal Court Criminal Appeal No. 2 of 1974]**

*Criminal Law & Procedure — Trial — Circumstantial evidence — Chemist's report — Links in evidence not established — Admission to doctor made while person in custody of police — Maxim that a man intends natural and probable consequences of his acts not to be avoided when dealing with question of intention in murder trials.*

*Evidence — Admission to doctor while person is in custody of police — Evidence Act, 1950, s. 26.*

This was an appeal against the conviction of the appellant on a charge of murder. There were several grounds of appeal with a lot of justification for complaint behind them.

**Held,** allowing the appeal: (1) the direction to the jury on circumstantial evidence was inadequate;

(2) no reliance could be placed on the chemist's report in this case by reason of the failure to adduce evidence that the blood samples were those of the appellant and the deceased, by calling the persons who actually took them and to whom they were handed after doing so;

(3) the admission made by the appellant to the doctor that he had killed a man during a fight was wrongly admitted as the appellant was then in the custody of the police;

(4) the use of the maxim "that a man intends the natural and probable consequences of his act" should be avoided when dealing with the question of intention in murder trials.

*Cases referred to:-*

(1) *Karam Singh* v. *Public Prosecutor* [1967] 2 M.L.J. 25.
(2) *Hodge's Case* (1838) 168 E.R. 1136, 1137.
(3) *Plomp* v. *The Queen* (1963) 110 C.L.R. 234, 243.
(4) *Martin* v. *Osborne* (1936) 55 C.L.R. 367, 375.
(5) *McGreevy* v. *Director of Public Prosecutions* (1973) C.A.R. 424, 435.
(6) *Fazal Din* v. *Public Prosecutor* [1949] M.L.J. 123.
(7) *Alec Bernett Sugarman* (1936) C.A.R. 114, 115.
(8) *Yeo Ah Siang* v. *Public Prosecutor* [1967] 1 M.L.J. 231, 234.
(9) *Pearl Kathleen Hyam* (1973) C.A.R. 824, 829.

FEDERAL COURT.

*V. Balendran* (*B. M. Bodipalar* with him).

*Gunn Chit Tuan* (Deputy Public Prosecutor) for the respondent.

**Gill C.J.** (delivering judgment of the Court): The appellant was convicted on a charge of murder under section 302 of the Penal Code at the High Court, Kuantan on February 20, 1974 and sentenced to death. We allowed his appeal and quashed the conviction and sentence. We now give our reasons for doing so.

We regret having to make a general observation that in our view the presentation of the case by the prosecution was poor. There were several grounds of appeal with a lot of justification for complaint behind them.

Now the trial judge had indicated to the jury that there was "no direct evidence in the sense that the prosecution have not produced witnesses to say they saw someone attacking the deceased. But in law a fact can be proved by indirect evidence or circumstantial evidence which can show who was the person who did it." The only other time he mentioned circumstantial evidence was in these terms: "Although there is no direct evidence, I think there is circumstantial evidence — and it is said that circumstantial evidence can have the accuracy of mathematics."

In our view, with respect to the trial judge, such direction to the jury seems inadequate. He was referred to *Karam Singh* v. *Public Prosecutor*[1] where this court said:

"In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused."

In *Hodge's* case,[2] which was made up of circumstances entirely, Alderson B. told the jury that, before they could find the prisoner guilty, they must be satisfied,

"not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person."

In *Plomp* v. *The Queen*[3] Dixon C.J., in referring to the rule that you cannot be satisfied beyond reasonable doubt on circumstantial evidence unless no other explanation than guilt is reasonably compatible with the circumstances, cited the following passage from *Martin* v. *Osborne*: [4]

"If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of fact to be proved is so high that the contrary cannot reasonably be supposed. The circumstances which may be taken into account in this process of reasoning include all facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of conduct pursued. The moral tendencies of persons, their proneness to acts or omissions of a particular description, their reputations and their associations are in general not matters which it is lawful to take into account, and

evidence disclosing them, if not otherwise relevant, is rigidly excluded."

Lord Morris of Borth-Y-Gest in *McGreevy* v. *Director of Public Prosecutions*[5] said:

"In a case in which inferences may have to be drawn by a jury from such facts as are found by them, a judge will wish to give the jury guidance as to their approach and in giving that guidance he will certainly be assisted by having in mind what was said by Alderson, B. and by Dixon, C.J. and by others who have given expression to the same line of thought. To the same effect were the words used by Lord Normand in *Teper* v. *R.* [1952] A.C. 480 when at p. 498 he said: 'Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another.... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.' So also were the words used by Lord Goddard C.J. in *Onufrejczyk* (1955) 39 Cr. App. R. 1; [1955] 1 Q.B. 388 (in dealing with the situation where in a murder case no corpse had been found) when at p. 3 and 394 of the respective reports he said: 'Now it is perfectly clear that there is apparently no reported case in English law where a man has been convicted of murder when there has been no trace of the body at all. But it is equally clear that the fact of death, like any other fact, can be proved by circumstantial evidence, that is to say, evidence of facts which lead to one conclusion, provided that the jury are satisfied and are warned that it must lead to one conclusion only'. 'If, having regard to the facts and circumstances of a particular case, a summing-up is held to have been inadequate and to have failed to set the jury on their proper line of approach or to give them proper guidance, a conviction might be held to be unsafe and unsatisfactory. But I am averse from laying down more rules binding on judges than are shown to be necessary.'

In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that, if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence, a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore, a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence, they could not say they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that, if a fact which they accept is inconsistent with guilt or may be so, they could not say that they were satisfied of guilt beyond all reasonable doubt.

In my view, it would be undesirable to lay it down as a rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form, provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond all reasonable doubt."

We have perused the record with great care. In our opinion, this was eminently a case where it could be said that after the close of the evidence for the prosecution (by this we mean admissible evidence) the case was one in which the jury could not safely convict. (See section 214 Criminal Procedure Code, F.M.S.). Evidence of the former girl friend of the accused (PW4) was relevant only in so far as it showed that she knew both the deceased and the appellant, that the deceased had been out with her on the night of his death and that she could identify the slippers, shirt and trousers worn by the deceased that night and his motor bike CD. 853. She said "I don't know relationship of accused and deceased. I have never seen accused and deceased quarrelling... It was once. He blocked with the motor bike." In the light of these remarks, and the evidence by two other witnesses of the one occasion when appellant assaulted the deceased, we think the evidence had more prejudicial effect than probative value and should never have been introduced.

The jury were invited to give "very careful attention and consideration to the Chemist's Report. Blood was found on the knife which corresponded to deceased's blood grouping — also blood on jacket, shirt, trousers of accused belonged to same blood group as blood on deceased's shirt, singlet, underpants and trousers." But in a case such as this, where the charge is murder and the evidence entirely circumstantial, the links in the chain of evidence must be strictly established. (See *Fazal Din* v. *Public Prosecutor*.[6] The Chemist's Report referred to two small bottles containing samples of blood alleged to be those of deceased and the appellant. P21 alleged to be deceased's blood sample and labelled "Chan Sow Peng" was not so labelled and turned out not to be a small bottle but a large cigarette tin with some liquid in it. The evidence was wholly unsatisfactory in other respects. The doctor who took the specimen of deceased's blood gave no direct testimony that she did so, or how she dealt with it after having done so. Dr. Liew's report mentioned "Specimen of blood handed over to Police." The O.C.P.D. said "I took a sample of blood of the deceased." He also said that he took the accused's blood sample on 22 February 1973. It is clear that no reliance can be placed on the Chemist's Report by reason of the failure to adduce evidence that the blood samples were those of the appellant and the deceased by calling the persons who actually took them and how they were sealed and labelled by them and to whom they were handed after doing so. There was no evidence as to ownership of the knife, the shirt and the other pair of slippers. No witness saw the Vespa near or at the scene. There was therefore nothing at this stage to connect the appellant with the death of the deceased.

The Medical Report is the only piece of "evidence" which tended to connect the appellant with the incident. The Doctor stated that the appellant readily agreed without guilt that he had killed a man at 11 p.m. during a fight. No one asked the doctor what she meant by "without guilt". In any event, with respect to the trial judge, it is our view that this report is clearly inadmissible by virtue of section 26 of the Evidence Act, 1950 which reads:

"Subject to any express provision contained in any written law, no confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a President of a Sessions Court or Magistrate, shall be proved as against that person."

*Sarkar* on Evidence (12th Edn.) at page 278 says: "A man may be in custody without having been formally arrested: it is sufficient that he cannot go where he likes." Here Tamsir bin Ishak (PW2) of Balai Polis, Kuantan, said "I did not allow him to go anywhere." The appellant was sent to Hospital for examination and brought back therefrom under police

escort and afterwards put in the lock-up. It is to be observed that section 26 speaks of custody and not arrest. Without this admission contained in the Medical Report, we can find no evidence at the end of the prosecution case to justify calling upon the appellant to make his defence.

Introduction of this Report and the irrelevant evidence of incidents months before the subject matter of the present charge give rise to the impression that the prosecution was trying to bolster a case which was clearly defective. In this connection we would refer to the remarks made in the case of *Alec Bennett Sugarman*: [7]

"It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done. It would be deplorable if any counsel for the Crown should refuse to stand on the real strength of his case and think that he can strengthen and support it by things collateral in a manner contrary to the letter and spirit of English law. By so doing he can only weaken his case and may prevent a verdict which ought otherwise to be obtained. As the Lord Chancellor (Lord Sankey) said in MAXWELL (24 Cr. App. R. 152, at p. 176): 'It must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed'."

Although the matter is now purely academic, we would comment on the criticism of the trial judge's reference in his summing-up to the "presumption of law... that a man intends the natural and probable consequences of his acts." Appellant's counsel cited a passage from the case of *Yeo Ah Siang* v. *Public Prosecutor*[8] where Syed Sheh Barakbah, L.P. after reviewing the authorities said:

"In view of the above observations we are of opinion that judges in this country should avoid using this maxim in their summings-up to the jury when dealing with the question of intention in murder trials."

More recently, the Court of Criminal Appeal in the case of *Pearl Kathleen Hyam*[9] said:

"Apart from any special rule applying to murder there is a general rule of law which enables a person's intention to be implied from his behaviour. The rule used to be stated in the form 'a man must be deemed to intend the natural consequences of his acts.' This is now agreed to be too rigid a proposition...

...In murder the classic form of direction was that if 'an ordinary reasonable man' or 'the accused as a reasonable man' must have known that death or grievous bodily harm was likely to result from his acts he was guilty of murder.... There is no suggestion in these cases that the inference is rebuttable.

There were indeed some nineteenth century cases in which the jury were directed to consider the intention of the accused himself, without further explanation of what was meant by 'intention'..... All these cases must now be looked at in the light of the decision of the House of Lords in *D.P.P.* v. *Smith* (1960) 44 Cr. App. R. 261; [1961] A.C. 290.

In that case the direction which Donovan J. gave to the jury contained the proposition 'A man must be taken (or presumed) to intend the natural consequences of his acts.' In the Court of Criminal Appeal ..... it was held that the jury should have been directed that this presumption was rebuttable. It was added, however, that if harm was certain to result no evidence could rebut the presumption. In the House of Lords it was held that Donovan J.'s direction was right, that the presumption was rebuttable only by proof of unsound mind and that the distinction between what was certain and what was likely to result was not warranted.

It has generally been supposed that the effect of this decision was to establish an objective test as appropriate in murder. This, however, is not the view of the Master of the Rolls who said in *Hardy* v. *Motor Insurers' Bureau* [1964] 2 Q.B. 745 at p. 758 that the test in murder was 'is the evidence so strong that we are satisfied that he, the accused man, must himself have been aware that grievous bodily harm was likely to result?

If that was, and remains, a correct statement of the law then the direction given by Ackner J. in the present case is not open to criticism. If, however, *D.P.P.* v. *Smith (supra)* did lay down an objective test, that has now been changed by the Criminal Justice Act 1967, section 8 which provides that: 'A court or jury, in determining whether a person has committed an offence — (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequences of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.'

...In our view, the effect of it is simply to substitute for the test depending on the natural and probable consequences of the accused's actions (i.e. what a reasonable man would have foreseen) the test of what the accused himself actually foresaw or intended. Once it is established by the evidence that he foresaw death or grievous bodily harm as a result, that is sufficient to establish his guilt."

As we have said that the appellant should have been acquitted at the close of the prosecution case, we do not propose to deal with the other grounds of appeal relating to the conduct of the trial. However, we feel that we should mention that when a submission of "no case" was being made, the jury should have been told to retire. It is not on record that that was done. We must also say that it was wrong to exclude the jury during counsel's address after the close of the defence. For that the appellant's counsel and the learned deputy must accept some blame, the former in applying for permission to address on law and the latter for advising the judge that in such event the jury should retire. No permission surely is required to sum up the defence case and the jury were entitled to listen, whether it be on law or fact, in order to arrive at a true verdict.

*Appeal allowed.*

Solicitors: *Maxwell, Kenion, Cowdy & Jones.*